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Supreme Court, U.S.
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No. 93-893

In the Supreme Court of the United States

OCTOBER TERM, 1993

DARRICK B. LEIKER, PETITIONER

v.

UNITED STATES OF AMERICA

AND OTHER CASES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the Judge Advocate General of the Air Force, who is not authorized to make appointments under the Appointments Clause of the Constitution, may appoint commissioned officers to serve as military trial and appellate judges.

2. Whether the Due Process Clause of the Fifth Amendment requires that military trial and appellate judges be appointed to their judicial duties for fixed terms.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Discussion	4
Conclusion	6

TABLE OF AUTHORITIES

Cases:

United States v. *Rice*, 36 M.J. 264 (C.M.A. 1993)	6
Weiss v. *United States*, No. 92-1482 (argued Nov. 3, 1993)	5, 6

Constitution and statutes:

U.S. Const. Art. II, § 2, Cl. 2 (Appointments Clause)	5-6
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 67(c), 10 U.S.C. 867(c) (Supp. IV 1992)	5
Art. 67a(a), 10 U.S.C. 867a(a) (Supp. IV 1992)	5
Art. 80, 10 U.S.C. 880	2
Art. 81, 10 U.S.C. 881	2
Art. 108, 10 U.S.C. 908	2
Art. 112a, 10 U.S.C. 912a	3, 4
Art. 119, 10 U.S.C. 919	4
Art. 120, 10 U.S.C. 920	2
Art. 125, 10 U.S.C. 925	2
Art. 128, 10 U.S.C. 928	3
Art. 132, 10 U.S.C. 932	3
Art. 134, 10 U.S.C. 934	3
28 U.S.C. 1259(3) (Supp. IV 1992)	5

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OPINIONS BELOW

The opinion of the Court of Military Appeals in *United States* v. *Leiker*, Pet. App. 88a-94a, is reported at 37 M.J. 418; the opinion of the Air Force Court of Military Review in that case, Pet. App. 95a-101a, is unreported. The opinion of the Court of Military Appeals in *United States* v. *Acton*, Pet. App. 102a-120a, is reported at 38 M.J. 331; the opinion of the Air Force Court of Review remanding the case for further fact finding is reported at 33 M.J. 536; the opinion on further review of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Jackson*, Pet. App. 121a-132a, is reported at 38 M.J. 106; the opinion of the Air Force Court of Military Review in that case is unreported. The

opinion of the Court of Military Appeals in *United States* v. *Johnson*, Pet. App. 133a-137a, is reported at 38 M.J. 88; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *Maxwell*, Pet. App. 138a-146a, is reported at 38 M.J. 148; the opinion of the Air Force Court of Military Review in that case is unreported. The opinion of the Court of Military Appeals in *United States* v. *French*, Pet. App. 147a-178a, is reported at 38 M.J. 420; the opinion of the Air Force Court of Military Review in that case is reported at 36 M.J. 589.

JURISDICTION

The judgment of the Court of Military Appeals in *United States* v. *Leiker* was entered on September 10, 1993; in *United States* v. *Acton*, *United States* v. *Jackson*, *United States* v. *Johnson*, and *United States* v. *Maxwell*, on September 28, 1993; and in *United States* v. *French*, on September 30, 1993. The petition for a writ of certiorari in these cases was filed on December 8, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. IV 1992).

STATEMENT

Petitioner Leiker was convicted by a general court-martial of vandalizing military property and conspiracy, in violation of Articles 108 and 81, Uniform Code of Military Justice (UCMJ), 10 U.S.C. 908 and 881. He was sentenced to a bad-conduct discharge, ten months' confinement, a partial forfeiture, and reduction to the lowest enlisted grade. The convening authority reduced the confinement and forfeiture but otherwise approved the sentence as adjudged. Pet. App. 88a-89a. The Court of Military Review affirmed

the findings and sentence (*id.* at 89a), and the Court of Military Appeals affirmed the decision of that court. Pet. App. 88a-94a.

Petitioner Acton was convicted by a general court-martial of presenting a false claim and committing an indecent act with his 12-year-old daughter, in violation of Articles 132 and 134, UCMJ, 10 U.S.C. 932 and 934. He was sentenced to a dishonorable discharge, confinement for three years, total forfeitures, and reduction to the lowest enlisted grade. Because of an error during the sentencing proceedings, the convening authority ordered a sentencing rehearing, at which petitioner received the same sentence. The convening authority then approved that sentence. The Air Force Court of Military Review remanded the case for further fact finding, and then, on further review, affirmed the findings and sentence. Pet. App. 103a. The Court of Military Appeals affirmed the decision of the lower court. Pet. App. 102a-120a.

Petitioner Jackson was convicted by a general court-martial of wrongfully using marijuana, in violation of Article 112a, UCMJ, 10 U.S.C. 912a. He was sentenced to a bad-conduct discharge, confinement for 30 days, and a reduction in rank. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence. Pet. App. 122a. The Court of Military Appeals affirmed the decision of the lower court. Pet. App. 121a-132a.

Petitioner Johnson was convicted by a general court-martial of four assaults and adultery with four different women, in violation of Articles 128 and 134, UCMJ, 10 U.S.C. 928 and 934. He was sentenced to a bad-conduct discharge, confinement and forfeiture of $250 pay per month for 12 months, and reduction to

the lowest enlisted grade. The convening authority approved the sentence. The Air Force Court of Military Review dismissed the first specification of assault based on a finding of an improvident plea of guilty, but otherwise affirmed the findings and sentence. Pet. App. 133a-134a. The Court of Military Appeals affirmed that court's decision. Pet. App. 133a-137a.

Petitioner Maxwell was convicted by a general court-martial of involuntary manslaughter, in violation of Article 119, UCMJ, 10 U.S.C. 919. He was sentenced to a bad-conduct discharge, confinement for two years, total forfeitures, and reduction to the lowest enlisted grade. The convening authority approved the sentence. The Air Force Court of Military Review affirmed the findings and sentence. Pet. App. 139a n.1. The Court of Military Appeals affirmed the lower court's decision. Pet. App. 138a-146a.

Petitioner French was convicted by a general court-martial of possessing lysergic acid diethylamide (LSD) and marijuana, and using marijuana and methamphetamine, in violation of Article 112a, UCMJ, 10 U.S.C. 912a. The convening authority approved the sentence of a bad-conduct discharge, confinement for eight months, partial forfeitures, and reduction to the lowest enlisted grade. The Air Force Court of Military Review affirmed the findings and sentence. Pet. App. 148a. The Court of Military Appeals affirmed the decision of the lower court. Pet. App. 147a-178a.

DISCUSSION

Petitioners present two claims. First, they argue that the military trial and appellate judges in their cases were not qualified to hold those positions

because they were appointed to them by the Judge Advocate General of the Air Force in violation of the Appointments Clause of the Constitution, Art. II, § 2, Cl. 2. Second, petitioners claim that their trials and their appeals to the Air Force Court of Military Review were fundamentally unfair because the military judges sitting on those courts do not enjoy a fixed term of office and can be reassigned to other military duties by the Judge Advocate General based on his evaluation of their performance as judges.

The questions presented in this petition are not materially different from the questions presented in *Weiss* v. *United States*, No. 92-1482 (argued Nov. 3, 1993), which is pending before the Court. Accordingly, we believe that this petition should be held until this Court has decided *Weiss* and should then be disposed of as appropriate in light of the Court's decision in that case.*

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* We note that petitioners Acton, Jackson, Johnson, and French did not raise either claim at any stage of their cases. What is more, no military court addressed those questions in their cases. Accordingly, it is not clear that their claims are subject to review by certiorari in this Court. We further note that although petitioner Maxwell raised both claims in his petition to the Court of Military Appeals, that court declined to grant review on either issue. The statutes providing for certiorari review of the judgments of the Court of Military Appeals, 10 U.S.C. 867a(a) (Supp. IV 1992) and 28 U.S.C. 1259(3) (Supp. IV 1992), restrict this Court's certiorari jurisdiction to "[d]ecisions" of the Court of Military Appeals. Article 67a(a) of the UCMJ, 10 U.S.C. 867a(a) (Supp. IV 1992), further provides that this Court may not review by certiorari "any action of the Court of Military Appeals in refusing to grant a petition for review." The Court of Military Appeals has the statutory authority to limit decisions in any case to less than all the issues urged by the accused. Article 67(c), UCMJ, 10

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Weiss* v. *United States*, No. 92-1482, and then should be disposed of as appropriate in light of the Court's decision in that case.

Respectfully submitted.

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U.S.C. 867(c) (Supp. IV 1992). Since petitioners Acton, Jackson, Johnson, and French did not raise these issues for review by the Court of Military Appeals and since the court did not pass on these issues in their cases or in the case of petitioner Maxwell, there is a question whether the court rendered a decision on the issues that the petitioners present in the petition.

It is unnecessary to answer that question in this case, however, because the Court of Military Appeals has indicated that it will accept out-of-time requests for relief from servicemembers if this Court grants relief to servicemembers in any of the other cases presently pending before the Court raising the same issues. *United States* v. *Rice*, 36 M.J. 264 (C.M.A. 1993). Thus, if this Court grants relief to the petitioners in *Weiss*, it may be appropriate to allow the Court of Military Appeals to decide whether to grant relief to parties such as these petitioners, since that course may render moot the question whether this Court can grant relief to such parties.